LAW OFFICE

213016

McLEOD, WATKINSON & MILLER

MICHAEL R. McLEOD
WAYNE R. WATKINSON
MARC E. MILLER
RICHARD T. ROSSIER
CHARLES A. SPITULNIK
RICHARD PASCO
ALEX MENENDEZ
AMY B. JONES

ONE MASSACHUSETTS AVENUE, N.W.
SUITE 800
WASHINGTON, DC 20001-1401
(202) 842-2345
TELECOPY (202) 408-7763

ELIZABETH A. HAWS
KATHRYN A. KLEIMAN*
OF COUNSEL
(*Admitted in Virginia only)

ROBERT RANDALL GREEN
LAURA L. PHELPS
DAVID R. GRAVES
GOVERNMENT RELATIONS

January 13, 2005

Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Forty Plus Foundation/Manhattan Central Railway Systems, LLC - - Feeder Line Application - - New York, NY, Finance Docket No. 34606

Dear Sir:

I am enclosing an original and ten (10) copies of the Reply of the City of New York, NY to Feeder Line Application in the above referenced case. Please date stamp the extra copy of this document and return to our messenger. In addition, we are enclosing a 3.5 inch diskette with this document.

Please let me know if you have any questions.

Sincerely,

Charles A. Spitulnik

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Enclosure

cc: Joseph H. Dettmar, Esquire
All Parties of Record

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BEFORE THE
SURFACE TRANSPORTATION BOARD

Finance Docket No. 34606

FORTY PLUS FOUNDATION/MANHATTAN CENTRAL RAILWAY SYSTEMS, LLC
FEEDER RAILROAD DEVELOPMENT APPLICATION –
PORTION OF THE CONSOLIDATED RAIL CORPORATION'S
WEST 30TH STREET SECONDARY TRACK IN NEW YORK, NY

REPLY OF THE CITY OF NEW YORK, NY TO FEEDER LINE APPLICATION

The City of New York, NY ("the City") hereby submits its reply to the Feeder Line Application of the Forty Plus Foundation/Manhattan Central Railway System ("Forty Plus" or "Applicant") submitted to this Board on December 13, 2004 but not accepted for filing until December 30, 2004 (the "Application"). Under the applicable rules, the Board through the Director of the Office of Proceedings, will accept or reject an application within thirty (30) days of filing, depending on whether the application is complete. 49 C.F.R. §1151.2(b). The Forty Plus Application is incomplete, and the Board should reject it.

BACKGROUND

The line that is the subject of the Forty Plus Application is the High Line – a 1.6 mile elevated line of railroad located on the west side of Manhattan, a line that has been the subject of litigation before this Board for over 20 years. *See* Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners - - Abandonment - - Portion of the Consolidated Rail Corp.'s West 30th Street Secondary Track in New York, NY,* 8 I.C.C. 2d 773 (1992) , *aff'd sub nom. Consolidated R. Corp. v. I.C.C.*, 29 F.3d, 706 (D.C. Cir. 1994). On December 17, 2002, the City submitted a

request for a Certificate of Interim Trail Use ("CITU") in that proceeding. *See*, Docket No. AB-167 (Sub-No. 1094)A, *Reply of the City of New York to Motion by Chelsea Property Owners That a Certain Settlement Agreement Satisfies the Surety Condition in the ICC's September 16, 1992 Order in this Proceeding ("CITU Request")* at paras. C1 – 5, pp. 9 – 10. In a filing in that same proceeding on September 22, 2004, the New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") joined the City in requesting a CITU with respect to a portion of the High Line. In that September 22 Supplemental Statement, the Consolidated Rail Corporation ("Conrail"), CSX Transportation, Inc. and CSX Corporation (collectively, "CSX" with all three referred to collectively as "the Railroads") advised this Board that they support the issuance of a CITU. Even more recently, Chelsea Property Owners ("CPO"), the original proponents of the adverse abandonment of the High Line, withdrew all of its objections to the City's request for a CITU. Docket No. AB-167 (Sub-No. 1094)A, *Chelsea Property Owners Withdrawal of its Objections to the Issuance of a Certificate of Interim Trail Use to the City of New York,* filed December 16, 2004. As a result, all parties to that proceeding with the exception of one property owner (*see,* Docket No. AB-167 (Sub-No. 1094)A, *Reply Of 511 West 23rd Street Associates, LLC To CITU Request In Support Of Adverse Abandonment Proceeding* filed on December 15, 2004) and Forty Plus, have, after many years of litigation and negotiation, reached consensus as to the fate of this 1.6 mile line.

Now, Forty Plus has come forward with an attempt to turn the Feeder Line process described in 49 U.S.C. §10907 and 49 C.F.R. Part 1151 on its ear. Forty Plus fails to satisfy the basic practical but essential requirements for a complete Feeder Line application. Since the information it lacks is not information in the possession of the Railroads that own the line, but is basic information about the applicant, the traffic it will move and its ability to sustain the

financial obligations associated with moving that traffic (whatever it may turn out to be) and maintaining the infrastructure to permit the operation to continue, the Application should be rejected as incomplete.

ARGUMENT

I. THE FORTY PLUS APPLICATION BEARS NO RELATION TO THE PURPOSES FOR WHICH CONGRESS ADOPTED THE FEEDER LINE PROGRAM.

Like all rail enthusiasts, Forty Plus is loathe to admit that a line of railroad, once a key link in the economic life of a thriving city, has no present value as a rail corridor. While some aging corridors have an as yet undiscovered future role to play as a link to the interstate rail network, the Feeder Line program is not the way to preserve them. Congress adopted the Feeder Line program to protect shippers and communities from loss of rail service that, when abandoned, would undercut the economic viability of the affected shippers. That valid objective bears no relationship to the circumstances presented by the High Line.

The statute requires the Board to order the sale of a rail line to a "financially responsible person"[1] when a railroad has indicated its interest in abandoning the subject line by placing it on the system diagram map and "the public convenience and necessity require or permit the sale of" the line. 49 U.S.C. §10907(b)(1)(A)(i). Congress adopted this program as part of the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895 (Oct. 14, 1980), with shippers in mind. The Conference Report that accompanied the passage of Staggers stated the following:

> A new feeder railroad development program is established *which gives shippers the opportunity to acquire a rail line* ... if the railroad is not providing adequate service. ... The commission must make certain findings before any acquisition can take place and the rail carrier must be given compensation for selling the line.

[1] The question whether Applicant is a "financially responsible person" is addressed in section II.A., below.

H.R. Conf. Rep. No. 1430, 96th Cong., 2nd Sess. 1980, 1980 U.S.C.C.A.N. 4110, 4116 (emphasis supplied).

Here, an entity that has as stated purpose assisting people in finding jobs in the area seeks to force the sale of a line, even though it has no shippers as co-applicants and has identified no traffic that wants to move over the line if it is revitalized. The Interstate Commerce Commission ("I.C.C.") has long ago determined that the public convenience and necessity justify the cessation of rail service on the line, at least for the present time. Docket No. AB-167 (Sub-No. 1094)A, 8 I.C.C. 2d at 794. The community that would be served by the line - - that is, the City of New York - - does not share the Applicant's enthusiasm for the sale. The City, instead, has proposed in Docket No. AB-167 (Sub-No. 1094)A a way to preserve the line for future restoration to rail service if the need should ever arise – a CITU, as provided in 16 U.S.C. §1247(d), and the Board's regulations at 49 U.S.C. §1152.29.

This Application relates to a line that has no traffic and has seen none for more than twenty years.[2] The Feeder Line Applicant has described no specific traffic that wants to move and produced no shippers that want to move any traffic. The prospects for development of that as yet unidentified traffic all lie in the future. The High Line at this point in time is outside the scope of rail lines for which Congress hoped to avoid abandonment by permitting the STB to force the sale.

[2] The reasons for the absence of traffic on the line that Forty Plus has postulated in the Application at 6-7 while interesting, are unverified. No shipper or other entity that experienced the changes that Forty Plus describes has joined the Application or provided an affidavit or other verification in support.

II. THE BOARD SHOULD REJECT THIS APPLICATION BECAUSE IT IS INCOMPLETE.

A. Applicant has not shown that it is a "financially responsible person" within the meaning of the applicable statute and regulations.

Forty Plus adds value to the City, as it does in all of the communities in which it has branch operations. However, good intentions and lofty rhetoric are not enough to satisfy the statutory and regulatory requirements. The regulations require that a Feeder Line applicant be able to demonstrate that it has the financial capacity to undertake the operations of the line it will acquire. This Application does not meet that very basic threshold, and must therefore be rejected.

The regulations require the applicant to demonstrate that it is a "financially responsible person" by showing its ability not only to pay for the line but also

> (ii) To cover expenses associated with providing services over the line (including but not limited to, operate costs, rents and taxes) for at least the first 3 years after acquisition of the line.

49 C.F.R. §1151.3(a)(3)(ii).

This Reply does not address the question of Forty Plus's ability to pay for the purchase price on the line. Rather, the City focuses here on the ability of the Applicant to cover the "expenses associated with providing service over the line." The burden of proving all of the elements required for a successful application rests on the Applicant. Applicant has not met that burden here.

Who is Forty Plus? According to the website of "Forty Plus of New York" (http://www.fortyplus-nyc.org), "Forty Plus of New York is the original self-help job search organization" (http://www.forty-plus-nyc.org/content.html). Neither the Application, nor the

website of the New York branch identifies any resources that would be available to Forty Plus from the organization's own coffers to sustain this obligation.

The bases for the confidence Forty Plus expresses in its ability to cover the costs of operation are elusive. Forty Plus describes itself as "affiliated" with Morristown and Erie Railway, Application at 9, and has submitted a document that Forty Plus describes as a Letter of Support. Letter dated December 10, 2004 from Gordon R. Fuller, Executive Vice President/Chief Operating Officer of M&E, to Tomislav Neuman, filed in this proceeding on January 3, 2005. However, there is no indication that M&E has pledged financial support for the restoration or operation of the line. M&E states that it will "collaborate with your company to reactivate" the High Line, but the letter includes no indication that M&E will underwrite this cost.

Forty Plus refers to the Railroads' expression of "a willingness to donate the line to a receptive **501(c)(3)** organization . . . "Application, at 13 (emphasis in original). Applicant has not demonstrated the Railroads' willingness to donate to this particular 501(c)(3), or that there has been any discussion with them to that end. Earlier in this proceeding Forty Plus made a similar point in the purported Notice of Intent to File a Feeder Line Application, filed on October 26, 2004. The City filed a Motion to Strike that Notice and dismiss the proceeding. On November 23, 2004, Robert M. Jenkins, III, counsel for the Railroads sent a letter to this Board both concurring in the City's Motion and stating that "the Railroads wish to disavow any suggestion that they would be interested in financially supporting Forty Plus/MCRS's inchoate proposal." Forty Plus has not demonstrated that the Railroads have changed their minds since November. Moreover, even if Forty Plus's statements are true, that donation does not account

for how Applicant will pay to restore and then maintain the line, or how it will cover the other costs associated with providing service over it.

Applicant relies on "simple logic" for the proposition that a large enough percentage of the "obvious overwhelming volume goods originating or terminating daily" will move over this line to sustain the cost of operations. Application at 16. Simple logic is not enough. There are references to nearby businesses, adjacent property owners and other commercial interests, but no statement of projected volumes, or descriptions of the outcome of discussions Applicant has had with any of these businesses such that the Board has any reason to believe that any have any interest in moving traffic over this line. The description of the needs of the Morgan Processing Center and the Javits Convention Center stop short of documenting traffic projections supplied to Applicant by either, or describing any discussions Applicant had had with them about moving traffic over the High Line.[3]

Applicant refers to hauling waste over this line. The City has recently announced plans to develop a major new plan for moving municipal solid waste out of the City's five boroughs. *E.g.*, "New York's Plan Would Ship Trash Out of the City by Barge, Not Truck," New York Times, October 28, 2004 at A28. Those plans do not at present include development of a waste collection or transfer facility at any point along the High Line that would bring traffic to this line.

Applicant refers, at p. 22, to Federal, state, and local grant programs. Some are loans (*e.g.*, the Railroad Rehabilitation Improvement Financing ("RRIF") Program, 49 C.F.R. Part 260), and some are grants. Applicant states it is eligible, and optimistically assumes that a sufficient volume of this money will flow into its coffers. Yet, Applicant has not proven that it

[3] Separately, in a letter dated October 13, 2004 and filed in Docket No. AB 167 (Sub-No. 1094)A on January 15, 2004, Elizabeth Bradford, General Counsel of the New York Convention Center Operating Corporation (which operates the Jacob K. Javits Convention Center of New York) confirmed the Javits Center's support for the City's proposed CITU. This support suggests that the Javits Center personnel have no interest in moving freight over the High Line.

has submitted any application, much less received any indication from the granting or loaning agencies that it is a likely recipient. Although Forty Plus states (without support or explanation) that $10 million will be required to rehabilitate the line, Application at 35, it does not state how much of that it hopes to finance or receive as grant money, or, if none of its requests for such funds are successful how it would hope to fund the rehabilitation. Nor has Forty Plus demonstrated how, if it is successful in securing a RRIF loan, it will generate the funds required to pay back that loan.

Applicant devotes a great deal of prose to its description of reasons why its plan should work. However, it offers no proof or financial projections based on actual shippers that have actually stated they would use this facility if reactivated. Applicant bears the burden of proving that it is financially responsible, that is, that it has the funds to purchase the line and to "cover expenses associated with that." 49 C.F.R. § 1151.3(a)(3)(ii). Applicant has not proven that it is a financially responsible person, and the Application should be rejected as incomplete.

B. Applicant has not demonstrated that the public convenience and necessity justify granting the application.

Applicant attempts to substitute ideas, putative logic and rhetoric for the evidentiary requirements of the statute. However, there is no substitute for compliance with the statutory and regulatory requirements in order to secure relief requested in an application. The statute and regulations require specific information to enable the Board to make the determination whether the public convenience and necessity require the sale of a line, rather than allowing it to be abandoned, or in this case made subject to a CITU. In the absence of that showing, the Application should be denied.

Section 10907 requires the following:

> (c) (1) For purposes of this section, the Board may determine that the public convenience and necessity require or permit the sale of a railroad line if the Board determines, after a hearing on the record, that—
>
> > (A) the rail carrier operating such line refuses within a reasonable time to make the necessary efforts to provide adequate service to shippers who transport traffic over such line;
> >
> > (B) the transportation over such line is inadequate for the majority of shippers who transport traffic over such line;
> >
> > (C) the sale of such line will not have a significantly adverse financial effect on the rail carrier operating such line;
> >
> > (D) the sale of such line will not have an adverse effect on the overall operational performance of the rail carrier operating such line; and
> >
> > (E) the sale of such line will be likely to result in improved railroad transportation for shippers that transport traffic over such line.

49 U.S.C. §109807(c). The statute requires proof of all five of these factors for the Board to make the required finding. Forty Plus has provided testimony as to none.

There is no doubt that the Railroads are not providing service over this line at this time. The City does not dispute that. No train has moved over this track in over 20 years. The railroads have not solicited business for this line and, the City is not aware that it has turned away any business that has sought to move here. But that information by itself does not mean that the test of §10907(c)(1) has been met. The statute requires a showing that the carrier has refused to move traffic offered by shippers that want to move traffic over the line, and this Application includes no such showing.

A recent decision by this Board in another feeder line case demonstrates the type of evidence that would satisfy the requirements of§10907(c)(1)(A) but which is completely

lacking here. In F.D. No. 34335, *Keokuk Jct. Ry. Co. – Feeder Line Acquisition – Line of Toledo, P. & W. Ry. Corp. Between LaHarpe and Hollis, IL, slip op.*, Service Date October 28, 2004, *pet. for reconsid.* filed November 29, 2004, the Board cites statements from shippers who sought to use the line but were quoted rates that to them "indicated . . . reluctance by TP&W to quote rates or provide service." *Id.* at 5. The information about high rates led the STB to conclude that "TP&W has not made the necessary efforts to provide adequate service." *Id.* at 7. The proponent offered testimony from five of the six shippers located on the line and five of 10 overhead shippers that supported the conclusion that "transportation is inadequate for a majority of shippers that transport traffic over the Line." *Id.*

The Board was able to find that the lack of service on the line supported the finding required by §10907(c)(1) that the railroad has not provided adequate service for shippers that want to move traffic over the line because the shippers testified as to the "demand for service on the part of the Line's shippers." *Id.* Forty Plus presents no such testimony here.

The statute refers to shippers and attempts to protect their interests. In the instant case, the question is "What shippers?" The statute and regulations require hard data and the Application provides none. *See, e.g.*, I.C.C. F. D. No. 31438, *Sandusky Co. et al. – Feeder Line Application – Consolidated Rail. Corp. Carrothers Secondary in Sandusky and Seneca Cos., Ohio*, 6 I.C.C. 2d 568 (1990) (applicant submitted financial statements including a pro forma income statement and cash flow projections based on traffic projections for the line, permitting the I.C.C. to conclude that applicant would be able to generate sufficient funds to meet this criterion).

As the City has stated previously, the prospects for movement of any traffic over this line are purely hypothetical and require development in the future. If Forty Plus and its

railroad partner, the M&E, develop that traffic and wish to come back to the Board with an application under 49 U.S.C. Part 1150 to operate the rail line after a CITU has been granted, they can do so. *See Norfolk & W. Ry. Co. – Abandonment Between St. Mary's and Minister in Auglaize Co., OH,* 9 I.C.C. 2d 1015. 1993 ICC Lexis 209 at *9-*10. At that time, when there are actual shippers that actually want to move traffic over this line, Forty Plus and M&E can prove that they have the traffic and resources that will be required to restore and then operate this line on an ongoing basis.

C. The remaining sections of the Application are similarly inadequate.

The list of deficiencies in this Application continues. 49 C.F.R. §1151.3(a)(2)(iii) requires a description of the applicant's affiliation with any railroad. The Application states on page 9 that MCRS is a *"Class III Shortline railroad"* that is "affiliated with the renown [sic] and highly respected **MORRISTOWN & ERIE RAILWAY INC. ("M&E").**" Application at 9 (emphasis in original). M&E, in its letter to Forty Plus dated December 10, 2004 stated that M&E "will collaborate with your company to reactivate the ex-CSX Highline in Manhattan for future rail service." While the Application describes at length the successful M&E operations in Maine and New Jersey, it neglects to describe "the nature of the affiliation" and the ways that M&E will provide the necessary support (financial, operating or otherwise) to ensure safe and efficient operation of the Line.

The Application's Operating Plan required by §1151.3(a)(7), is long on hope and short on specifics. Where there is no certainty over what traffic, if any, will move on the Line and the technology that the Applicant proposes to use has not been tested in the operating environment presented by the High Line, the preparation of an Operating Plan that complies with

the Board's regulations is difficult at best. However, that difficulty underscores one of the two most basic flaws in the Forty Plus proposal – there is no traffic to move over this line.

CONCLUSION

There is a time and place for a Feeder Line Application to come before the Board to save a line and the community and the shippers that rely on it. This is neither the time nor the place for this Application. The City does not support this application and believes that its economic interests can best be served by granting the request for a CITU that it has filed in Docket No. AB-167 (Sub-No. 1094)A, thus preserving the corridor for future restoration to service if necessary. There are no shippers that have professed a need for this line to return to operation now, or that have expressed an interest in beginning to move traffic over this line. There is no firm evidence that Forty Plus has the funds to pay for the rehabilitation of this line. There is no projection of how much the operations will cost during the first three years and how Forty Plus plans to cover those costs. There is no evidence that the public convenience and necessity justify this sale rather than the abandonment that the I.C.C. found was consistent with the public convenience and necessity in 1992.

WHEREFORE, and in view of all of the foregoing, the City hereby respectfully requests the Board to determine that the Feeder Line Application is incomplete, and determine that it can not be accepted.

Respectfully submitted,

Charles A. Spitulnik
Alex Menendez
McLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, DC 20001
(202) 842-2345

Howard Friedman
Joseph T. Gunn
NEW YORK CITY LAW DEPARTMENT
100 Church Street
New York, NY 10007
(212) 788-0727

Counsel for the City of New York, NY

Dated: January 13, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of January, 2005, I served a copy of the foregoing REPLY OF THE CITY OF NEW YORK, NY TO FEEDER LINE APPLICATION by first class mail, postage prepaid, on:

Tomislav R. Neuman
Executive Director
Forty Plus Foundation
7 Monmouth Road, Suite #1
Oakhurst, NJ 07755

John D. Heffner
Attorney at Law
1920 N Street, N.W.
Suite 800
Washington, D.C. 20036

Peter Shudtz
Vice President of Regulatory Policy
CSX Corporation
1331 Pennsylvania Avenue, N.W.
Suite 560
Washington, D.C. 20004

Carolyn F. Corwin
Kimberly K. Egan
Covington & Burling
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

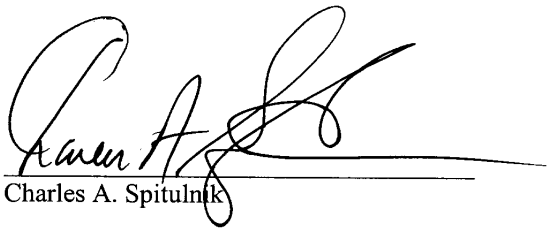
Gordon R. Fuller
Executive Vice President/
Chief Operating Officer
Morristown & Erie Railway Inc.
P. O. Box 2206
Morristown, NJ 07962-2206

Jonathan M. Broder
Vice President-Law and General Counsel
Consolidated Rail Corporation
2001 Market Street, 29th Floor
Philadelphia, PA 19103

John H. Broadley
John H. Broadley & Associates, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007

Robert M. Jenkins
Mayer Brown Rowe & Maw
1909 K Street, N.W.
Washington, D.C. 20006

Jonathan M. Broder
Vice President-Law and General Counsel
Consolidated Rail Corporation
2001 Market Street, 29th Floor
Philadelphia, PA 19103



Charles A. Spitulnik